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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1944

No. 510 - 511

MARKET STREET RAILWAY COMPANY,
Appellant,

vs.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA and FRANCK R. HAVENNER, C. C. BAKER, JUSTUS F. CRAEMER, RICHARD SACHSE and FRANK W. CLARK, the members of and constituting the Railroad Commission of the State of California.

BRIEF OF APPELLANT OPPOSING APPELLEES' MOTION TO DISMISS OR AFFIRM.

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Table of Contents

Table of Cases Cited

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BRIEF OF APPELLANT OPPOSING APPELLEES' MOTION TO DISMISS OR AFFIRM.

The sole ground upon which appellees move to dismiss the appeal or affirm the judgment of the Court below is that no substantial federal question is presented. Concededly every other requisite to this Court's jurisdiction on appeal exists.

The motion is without merit. Obviously the federal questions presented are not frivolous, nor do appellees so contend. Neither are they foreclosed by any prior decision of this Court. On the contrary, they were decided in a manner in conflict with the decisions of this Court.

I.

THE QUESTION WHETHER APPELLANT HAD NOTICE OF AND OPPORTUNITY FOR HEARING IS A SUBSTANTIAL FEDERAL QUESTION.

In our jurisdictional statement we pointed out that the procedure followed by the Commission in this case did not give appellant the notice and opportunity for hearing guaranteed by the due process of law clause of the Fourteenth Amendment under the principles laid down in *Morgan v. United States*, 304 U.S. 1. Appellees reply that since the caption of the case and the order instituting the proceedings referred to the reasonableness of appellant's rates, and since this caption was read by the presiding Commissioner at the commencement of the proceedings,[1] appellant was sufficiently apprised that its rates were in issue and was given an opportunity for hearing on that issue. These very circumstances were present in the *Morgan* case and held insufficient. Appellees further contend that the procedure here followed was approved in *American Bridge Co. v. Comm'n*, 307 U.S. 486. That case is authority for no such proposition. There the similar contention made by the appellant was not only an afterthought (307 U.S., pp. 492-493), but, as the Supreme Court

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[1]Reporter's Transcript, p. 2.

of California pointed out, "the issues were . . . clearly defined and understood by all parties concerned during the course of the hearing."[2]

In contrast, after the proceedings in the case at bar had been instituted by a conventional form of order in the broadest possible terms, all concerned took the position that rates were not involved. Three Commissioners said expressly that the subject of the hearing was otherwise.[3] The principal witness for appellees pointed out that the study and investigation made by him and other Commission witnesses "does not analyze the rate situation."[4] Examination of the record discloses unequivocally that the hearing was concerned with improvement in service. As was stated by the presiding Commissioner:[5]

> "Well, of course, this investigation was undertaken with the hope that it might result in some improvement of the public transportation for the people of San Francisco and the investigation will be very broad in its scope and will go to almost every aspect of that question as it affects the operations of the Market Street Railway Company."

The only references to rates were incidental and historical. Evidence customary in a rate case is conspicuous by its absence. Directly contrary to the *American Bridge Co.* case, the course of proceedings here specifically directed inquiry to issues other than rates. The result was a hearing in which petitioner was not fairly informed of what

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[2] *American Toll Bridge Co. v. Railroad Commission*, 12 Cal. (2d) 184, 207. And see the opinion of this Court, 307 U.S. 486, 492-493.

[3] Exhibit E to Petition for Writ of Review.

[4] Exhibit F to Petition for Writ of Review; Reporter's Transcript, pp. 138, 156.

[5] Exhibit E to Petition for Writ of Review.

the issues were to be, and in which the issue of the reasonableness of its rates was never "clearly defined and understood by all parties concerned during the course of the hearing."[6] Further in contrast to the *American Bridge Co.* case, when appellant in this case was first apprised by the decision and order of the Commission that its rates were attacked, it immediately asked an opportunity to submit evidence on this issue.[7] This was denied.[8]

Appellees cite *West Ohio Gas Co. v. P. U. Commission*, 294 U.S. 63, 70, for the proposition that even if the proceedings before the Commission were conducted without notice and opportunity for hearing, still the order of the Commission is not invalid unless "confiscation be shown." That case, of course, does not so hold, but its citation serves to emphasize the substantial character of the remaining grounds of appellant's attack upon the order. The proceeding having been conducted as just described, it is not surprising that the order is without support in the evidence, is contrary to the evidence, and is confiscatory.

II.

THE QUESTIONS WHETHER THE ORDER IS WITHOUT SUPPORT IN THE EVIDENCE, IS CONTRARY TO THE EVIDENCE, AND IS CONFISCATORY, ARE SUBSTANTIAL FEDERAL QUESTIONS.

The making of an administrative order without substantial evidence to support it is a denial of procedural due

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[6]Footnote 2, supra.
[7]Exhibit C to Petition for Writ of Review.
[8]Appendix 2 to Statement as to Jurisdiction.

process. As this Court said in *Railroad Commission v. Pacific Gas & Electric Co.*, 302 U.S. 388, 392, 393:

> "• • • we are concerned only with the question of procedural due process, that is, whether the Commission in its procedure, as distinguished from the effect of its order upon respondent's property rights, failed to satisfy the requirements of the Federal Constitution.
>
> • • • There must be due notice and an opportunity to be heard, the procedure must be consistent with the essentials of a fair trial, and the Commission *must act upon evidence* and not arbitrarily." (Italics ours.)

The quotation from the same case in appellees' statement opposing jurisdiction must be read in the light of the foregoing.

In the jurisdictional statement we pointed out the indispensable particulars—entirely aside from the rate base—concerning which evidence is lacking in this record. Appellees do not dispute our statements; they refer this Court to no evidence supporting the order. Their motion in this regard consists simply of one sentence, asserting without supporting data, references or argument, that appellant has failed to carry the burden of proving confiscation and failed to overcome the presumption of the validity of the Commission's order. They refer to *Power Comm'n v. Hope Gas Co.*, 320 U.S. 591. But in that case the Commission found *on evidence* that the rate of return fixed would permit Hope to earn $2,191,314 annually, and that this return would "enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks as-

sumed" (320 U.S., 604, 605). In the case at bar there is no evidence of estimated traffic under the new fare, of estimated revenue under the new fare, of estimated expense under the new fare—no evidence from which the Commission could determine or form a reasonable estimate of appellant's earnings or rate of return under the order. For one example, the Commission assumed in support of the figures given in its decision as the estimated revenues under the six-cent fare an increase of ten per cent in passenger traffic.[9] There is no evidence in the record to support this or any other figure. Paraphrasing this Court's opinion in *West Ohio Gas Co. v. P. U. Commission,* 294 U.S., 63, 68, the Commission might with as much reason have assumed an increase of five per cent, or of eight per cent, or of fifteen per cent, or of any other figure. "This was wholly arbitrary" (294 U.S., 68).

Further, the figures given by the Commission as the gross revenues and operating expenses for the first eight months of 1943, which figures formed the basis of other calculations made by the Commission, were not based on any evidence in the record. In its brief before the California Supreme Court the Commission frankly admitted that certain figures in its decision relating to appellant's operating revenues were taken from reports outside the record and not in evidence. It is not due process of law to base a determination upon evidential facts forming no part of the record.

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[9]Nothing in the decisions or the orders of the Commission showed that this was how the Commission had arrived at the figures stated, but the Commission conceded in its answer to the petition for writ of review in the court below (which forms a part of the record in this case) that its figures were based upon this assumed increase (Answer of Railroad Commission to Petition for Writ of Review, p. 29).

"The basic elements of such a hearing include the right of each party to be apprized of all the evidence upon which a factual adjudication rests, plus the right to examine, explain or rebut all such evidence" (*Carter v. Kubler*, 320 U.S. 243, 247).

And see:

Ohio Bell Tel. Co. v. Comm'n, 301 U.S. 292, quoted below.

Notwithstanding appellees' concession that the Commission's essential conclusions in this and other regards are without any evidentiary support in the record, the Supreme Court of California sustained the order upon the ground that "The commission has the experience and the data at hand from which to cull the estimates of probable increase in traffic under a reduced fare and improved service, and of the probable future operating revenues, expenses, and other costs."[10]

This ruling is contrary to the most fundamental concepts of due process of law. As this Court said in *Ohio Bell Tel. Co. v. Comm'n*, 301 U.S. 292, 300-302:

"The fundamentals of a trial were denied to the appellant when rates previously collected were ordered to be refunded upon the strength of evidential facts not spread upon the record.

* * * * *

An attempt was made by the Commission and again by the state court to uphold this decision without evidence as an instance of judicial notice. Indeed, decisions of this court were cited * * * as giving support to the new doctrine that the values of land and labor

[10]See Appendix 3 to Statement as to Jurisdiction.

and buildings and equipment, with all their yearly fluctuations, no longer call for evidence. Our opinions have been much misread if they have been thought to point that way. Courts take judicial notice of matters of common knowledge. * * * They take judicial notice that there has been a depression, and that a decline of market values is one of its concomitants. * * * *How great the decline has been for this industry or that, for one material or another, in this year or the next, can be known only to the experts, who may even differ among themselves.* For illustration, a court takes judicial notice of the fact that Confederate money depreciated in value during the war between the states * * * but not of the extent of the depreciation at a given time and place. * * * The distinction is the more important in cases where as here the extent of the fluctuations is not collaterally involved but is the very point in issue. * * *

What was done by the Commission is subject, however, to an objection even deeper. * * * There has been more than an expansion of the concept of notoriety beyond reasonable limits. From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion." (Italics ours.)

The Commission cited *Clark's Ferry Co. v. Comm'n*, 291 U.S. 227, as authority for the proposition that, without evidence, it could "forecast into the future what the traffic was going to be * * *."[11] This is another example of an

[11]Opinion on rehearing, Appendix 2 to Statement as to Jurisdiction.

opinion of this Court "much misread." In the *Clark's Ferry* case, this Court approved a tentative schedule of rates based upon evidence taken at a full and fair hearing. The reports of that case expressly disclose that expert testimony concerning estimated revenues under the order was taken in the proceeding before the Commission.[12] There is no such evidence in this case.

Not only are the Commission's findings in the instant case as to traffic and revenue without evidentiary support; they are contrary to the evidence. To cite but one example: The Commission assumed an increase in passenger traffic of ten per cent in arriving at an estimated gross revenue of $8,500,000.[13] At the same time it assumed an increase of only $60,000 in operating expense,[14] less than one per cent. The uncontradicted testimony is that an increase in traffic would require a proportionate increase in facilities,[15] with a proportionate increase in operating expense.

Turning to the question of confiscation, on the Commission's own figures it is manifest that the effect of the order will be to compel appellant to operate at an actual loss. The Commission's figures for operation under the six-cent fare were: gross revenue $8,500,000; operating expenses $8,000,000.[16] Deducting the ten per cent assumed increase, which is without support in the evidence, the gross revenue becomes $7,650,000, or $350,000 less than the

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[12]See the opinion of the Superior Court of Pennsylvania, 108 Pa. Super. Ct. 49, 165 Atl. 261, 272.

[13]Supra Note 9; Appendix 1 to Statement as to Jurisdiction.

[14]Appendix 1 to Statement as to Jurisdiction.

[15]Reporter's Transcript, pp. 260-261.

[16]Appendix 1 to Statement as to Jurisdiction.

estimated operating expenses. An actual operating loss is still shown even if the operating expenses allowed for the seven-cent fare (without stimulation of traffic) be taken. The Commission estimated that operating expenses under the seven-cent fare would be $7,940,000.[17] Allowing for no increase in operating expense as a corollary to the disallowance of the assumed increase in passenger traffic, the figures still remain:

Gross Revenue	$8,500,000
Less 10%	850,000
	$7,650,000
Less operating expenses	7,940,000
A loss of	$ 290,000

Looking at the matter another way and assuming that there may, in fact, be increased traffic amounting to $850,000, a proportionate increase in expense (apart from depreciation and taxes) would be $660,000, instead of the $60,000 allowed by the Commission—more than sufficient to wipe out the Commission's estimated profit of $500,000.

The foregoing answers the points in appellees' motion. Other substantial questions involved are set forth in our jurisdictional statement. It would be difficult and inappropriate at this stage, without a printed record or even an unprinted record consecutively paged to which reference can be made, to elaborate our contentions. Further argument and analysis of the record properly await the hearing on the merits. The case is within the appellate juris-

[17] Appendix 1 to Statement as to Jurisdiction.

diction of this Court. It presents substantial federal questions. Appellees' motion should be denied.

Dated, San Francisco, California,
August 21, 1944.

Respectfully submitted,

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